COURT OF APPEALS
DECISION
DATED AND FILED

June 20, 2006

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2006AP588 **Cir. Ct. No. 2005TP26**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

IN RE THE TERMINATION OF PARENTAL RIGHTS TO DAVID K., A PERSON UNDER THE AGE OF 18:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

BOBBIE K.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: MICHAEL G. MALMSTADT, Judge. *Affirmed*.

¶1 CURLEY, J. Bobbie K. appeals the order terminating her parental rights to her son, David K. She argues that the trial court lost competency to

proceed in this matter when it failed to hold the fact-finding hearing within forty-five days of the initial appearance as required by WIS. STAT. § 48.422(2).[1] Because the trial court found good cause, pursuant to WIS. STAT. § 48.315(2), for adjourning the fact-finding hearing beyond the forty-five day limit, this court affirms.

I. BACKGROUND.

¶2 Bobbie K. gave birth to her fourth child, David, on August 27, 2003. Due to concerns that Bobbie K. was incapable of caring for her children on her own,[2] the Bureau of Milwaukee Child Welfare (BMCW) had already placed all three of Bobbie K.'s other children in foster care, and, in December 2004, Bobbie K.'s parental rights to David's older siblings were terminated. Because of concerns similar to the ones the BMCW experienced with Bobbie K.'s other children, the BMCW placed David in foster care the day after he was born. On August 12, 2004, the court found that David was a child in need of protective services (CHIPS) and entered a dispositional order placing David in a foster home. Pursuant to WIS. STAT. § 48.357 (2003-04), the court ordered Bobbi K. to satisfy certain conditions in order for David to return to her home. However, nearly three years after David's birth, Bobbie K. had not met the conditions, and David had spent his entire life in foster care.

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[1] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

[2] The Bureau of Milwaukee Child Welfare concerns included: the developmental delay experienced by Bobbie K.'s oldest child, the condition and safety of her home, and her psychological well-being. Psychological testing, done in February 2003, indicated that Bobbie K. was mildly mentally retarded and suffered from dependent personality disorder and low-grade depression.

¶3 On January 19, 2005, the State filed a petition seeking to terminate the parental rights of Bobbie K. and the biological father to David.[3] As grounds for termination with respect to Bobbie K., the State alleged that she failed to assume parental responsibility for David as defined in WIS. STAT. § 48.415(6).

¶4 WISCONSIN STAT. § 48.422(1) states that after a petition for termination of parental rights is filed, a court has thirty days from the date of the filing to conduct an initial hearing to determine whether any party wishes to contest the petition. If a party contests the petition, the court must set a date for a fact-finding hearing (trial), which must begin within forty-five days of the initial hearing on the petition. Sec. 48.422(2). If these statutory limits cannot be met, delays may be permitted under §§ 48.315(1)(a)-(f), or a continuance may be granted if good cause exists; however, the continuance may last only for as long as necessary, *see* sec. 48.315(2).

¶5 Here, Bobbie K., the State, and David's guardian ad litem appeared before the court for an initial hearing on February 17, 2005, twenty-nine days after the petition was filed, thus satisfying the statutory deadline. At the hearing, Bobbie K. notified the court that she wished to contest the petition and requested a jury trial; as a result, the State proceeded with an involuntary termination procedure. In attempting to set a trial date, the court offered May 7, 2005– seventy-nine days after the initial hearing. However, because defense counsel already had a jury trial scheduled on that day, another date had to be chosen. The court then offered June 13, 2005, and because none of the parties had conflicts

[3] David's biological father, Gerald S., voluntarily terminated his parental rights to David. Gerald S. is not a party to this appeal; therefore, the termination of his parental rights will not be addressed.

with that date, the trial was set for June 13, 2005–116 days after the initial hearing. After the parties and the court agreed on a trial date, the court asked David's guardian ad litem if she agreed to toll the time limits, which she did. Lastly, the court tolled the time limits on the record, stating it was doing so "for good cause due to the calendar of the Court and the parties."

¶6 Between the initial hearing and trial, the State filed an amended petition for termination of Bobbie K.'s parental rights. The amended petition added continuing CHIPS as an additional ground for termination of Bobbie K.'s parental rights to David pursuant to WIS. STAT. § 48.415(2). Under § 48.415(2), the State alleged that Bobbie K. had not met the conditions for the return of David to her care that the court had established on August 12, 2004.

¶7 At trial, the jury found that the State had proven both grounds it had alleged for the termination of Bobbie K.'s parental rights: failure to assume parental responsibility and continuing CHIPS. A dispositional hearing was held on July 11, 2005, at which the trial court determined that termination of Bobbie K.'s parental rights to David was in David's best interest. The court issued a written order involuntarily terminating Bobbie K.'s parental rights. Bobbie K. now appeals the termination of her parental rights to David.

II. ANALYSIS.

¶8 Bobbie K. contends that the trial court lost competency to proceed when it failed to hold a fact-finding hearing within the time required by statute. A competency challenge based on a violation of the statutory time limits, *see* WIS. STAT. § 48.422(2), is a question of law that this court reviews *de novo*. ***Sheboygan County Dep't of Social Servs. v. Matthew S.***, 2005 WI 84, ¶15, 282 Wis. 2d 150, 698 N.W.2d 631.

¶9 As noted, when a petition for the termination of parental rights has been filed, WIS. STAT. § 48.422(1) requires that a court conduct a hearing within thirty days of the filing of the petition to determine whether any party wishes to contest the petition. If a party does wish to contest the petition, the court must set a date for a fact-finding hearing, often referred to as a trial, which must begin within forty-five days of the initial hearing. Sec. 48.422(2).

¶10 "The Children's Code contains no provision for the waiver of time limits, and the only provisions for delays, continuances and extensions are set forth in § 48.315, Stats." ***State v. April O.***, 2000 WI App 70, ¶5, 233 Wis. 2d 663, 607 N.W.2d 927. WISCONSIN STAT. § 48.315(1) permits delays of the time limits under the following circumstances:

> (a) Any period of delay resulting from other legal actions concerning the child ….
>
> (b) Any period of delay resulting from a continuance granted at the request of or with the consent of the child and his or her counsel or of the unborn child by the unborn child's guardian ad litem.
>
> (c) Any period of delay caused by the disqualification of a judge.
>
> (d) Any period of delay resulting from a continuance granted at the request of the representative of the public under s. 48.09 ….
>
> (e) Any period of delay resulting from the imposition of a consent decree.
>
> (f) Any period of delay resulting from the absence or unavailability of the child ….
>
> (fm) Any period of delay resulting from the inability of the court to provide the child with notice of an extension hearing under s. 48.365 due to the

> child having run away or otherwise having made himself or herself unavailable to receive that notice.
>
> (g) A reasonable period of delay when the child is joined in a hearing with another child as to whom the time for a hearing has not expired under this section if there is good cause for not hearing the cases separately.
>
> (h) Any period of delay resulting from the need to appoint a qualified interpreter.

Furthermore, § 48.315(2) explains the circumstances under which a court may grant a continuance to the time limits:

> A continuance shall be granted by the court only upon a showing of good cause in open court or during a telephone conference under s. 807.13 on the record and only for so long as is necessary, taking into account the request or consent of the district attorney or the parties and the interest of the public in the prompt disposition of cases.

¶11 In ***In re J.R.***, 152 Wis. 2d 598, 449 N.W.2d 52 (Ct. App. 1989), this court further explained the delays and continuances set forth in WIS. STAT. §§ 48.315(1) and (2). This court held that "the enumerated specific circumstances noted in § 48.315(1) do not provide the exclusive grounds for time extensions." ***J.R.***, 152 Wis. 2d at 607. This court also held that "[t]he good cause requirements of § 48.315(2), Stats., control all extensions of time deadlines under the Children's Code," and that the trial court must make a good cause finding "in a timely manner on the record." ***J.R.***, 152 Wis. 2d at 607.

¶12 Bobbie K. contends that: (1) the circuit court's finding of good cause to toll the time limits under WIS. STAT. § 48.315(2) is not supported by the record; and (2) the guardian ad litem's consent to toll the time limits does not satisfy the requirements of § 48.315(1)(b). First, Bobbie K argues that the first

date the court offered for the fact-finding hearing, May 7, 2005, was beyond the forty-five day mandatory deadline. Next, Bobbie K. contends that because the record does not address why the court did not offer an earlier date, this court can only speculate that May 7, 2005, was the first date that the circuit court had open for the fact-finding hearing. Thus, Bobbie K. argues that "[i]n the absence of any specific facts regarding the court and the parties' calendars, the circuit court's finding of good cause for scheduling the trial date beyond the forty-five-day statutory deadline cannot be upheld on appeal." This court disagrees.

¶13 The court may grant a continuance under WIS. STAT. § 48.315(2) "for court congestion provided that good cause is shown and the trial court does so in a timely manner on the record." ***J.R.***, 152 Wis. 2d at 607. Here, the circuit court made an explicit finding of good cause on the record:

> THE COURT: Okay. Are you able to set trial and final pre-trial dates right now?
>
> ….
>
> THE CLERK: May 7th at ten a.m. for a jury trial date?
>
> [ATTORNEY FOR BOBBIE K.]: I have a jury trial in Branch 40 that day.
>
> THE CLERK: June 13th at ten?
>
> [ATTORNEY FOR BOBBIE K.]: That's fine.
>
> [ASSISTANT DISTRICT ATTORNEY]: That's fine.
>
> [GUARDIAN AD LITEM FOR DAVID]: Fine.
>
> THE CLERK: That's your jury trial date. June 13th at ten a.m.
>
> ….

> THE COURT: Toll the time limits for good cause due to the calendar of the Court and the parties.

¶14 Next, a reviewing court may examine the record to determine whether good cause existed under WIS. STAT. § 48.315(2) and whether the delay was only for so long as necessary. ***State v. Robert K.***, 2005 WI 152, ¶34, 286 Wis. 2d 143, 706 N.W.2d 257. Courts consider four factors when evaluating whether good cause exists: (1) good faith of the moving party; (2) prejudice to the opposing party; (3) prompt remedial action by the dilatory party; and (4) the best interest of the child. ***Id.***, ¶35.

¶15 Regarding the first factor in evaluating good cause, no evidence exists in the record to show that any party was seeking to extend the date of the fact-finding hearing without the requisite good faith. Rather, the discussion on the record suggests that the court was scheduling the fact-finding hearing while trying to accommodate the scheduling needs of the various participants and working within the calendaring constraints of the court.

¶16 Furthermore, the date for the fact-finding hearing needed to fit within the circuit court's calendar. The circuit court was cognizant of the time limits and explicitly stated the basis for concluding good cause existed to extend the fact-finding hearing beyond the forty-five-day statutory limit. *See* ***id.***, ¶55. These facts are sufficient to show that the deadline was extended in good faith.

¶17 The second factor in evaluating good cause is whether there was prejudice against the objecting party. Bobbie K. has shown no prejudice that was caused by scheduling the fact-finding hearing past the forty-five-day statutory deadline. To the contrary, as the court noted in ***Robert K.***, the delay may have given Bobbie K. an additional opportunity to meet the conditions for safe return of

her children. *See* ***id.***, ¶49. When considering whether to terminate parental rights, a jury must consider "all evidence bearing on that question, including evidence of events and conduct occurring since the filing of the petition." WIS JI—CHILDREN 324. During the delay, Bobbie K. still had visitation rights to David; thus, as was the case in ***Robert K.***, the delay offered Bobbie K. an additional opportunity to change her behavior such that a jury could be convinced that she would meet the conditions for safe return of her children within twelve months of the fact-finding hearing. *See* ***Robert K.***, 286 Wis. 2d 143, ¶49.

¶18 The third factor in evaluating good cause is whether the dilatory party took prompt remedial action. However, this factor is inapplicable here because there was no dilatory party. *See* ***id.***, ¶50. The circuit court read only two trial dates off its calendar, and only the first date conflicted with a party's schedule. All parties agreed to the next available date. Therefore, similar to ***Robert K.***, the record shows that no party intended to delay the proceedings longer than necessary. *See* ***id.***

¶19 Finally, the last factor in evaluating good cause is the best interest of the child. Here, the court attempted to schedule a fact-finding hearing when the parent, lawyers, and guardian ad litem could be present. Scheduling a fact-finding hearing when all parties are available is in the best interest of the child. *See* ***id.***, ¶51.

¶20 Therefore, in the instant case, all the factors of good cause have been satisfied. Additionally, the delay was for no longer than was necessary. The circuit court tolled the time limits due to the "calendar of the Court and parties." Thus, the record indicates that the first date available after the forty-five-day statutory deadline was May 7, 2005. Because this date conflicted with a parties'

calendar, the date of the fact-finding hearing was pushed back to June 13, 2005. The facts of this case show that, given the calendar constraints of the court and parties, the delay was for no longer than was necessary.

¶21 Because this court holds that good cause existed to toll the time limits under WIS. STAT. § 48.315(2) in the instant case, this court does not address the issue of whether a guardian ad litem's consent satisfies the requirements of § 48.315(1)(b). Accordingly, we affirm.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.